IN THE

Supreme Court of the United States

October Term, 1973

No. 73-884

DELORES MENDOZA, *et al.*,

Petitioners,

vs.

UNITED FARM WORKERS ORGANIZING COMMITTEE, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JONATHAN C. GIBSON,
707 Broadway, Suite 1212,
San Diego, Calif. 92101,

REX H. REED,
1990 M Street, NW, Suite 400,
Washington, D.C. 20036,

JOHN L. KILCULLEN,
1747 Pennsylvania Avenue, N.W.,
Washington, D.C. 20006,

RICHARD B. ISHAM,
2929 Main Street, Suite A,
Visalia, Calif. 93277,

Counsel for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioners, Dolores Mendoza, Rudolpho B. Silva, Ted Ramos, Fred Aquino, Nash Basconcillo, Sally De La Rosa, Gabriel Olmos, Nazario Burrola, Ruperto G. Cavillas, Dan Foronda, Colin Llanega, Frank Mendoza, Bill Mookini, Anthony Nadal, Eva Nadal, Jean Ann Nool, Antonio Nool and Vivian Sadoy, respectfully pray that a writ of certiorari issue to review the final judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 7, 1973.

Opinion Below.

The opinion of the Court of Appeals dated September 7, 1973 affirmed the judgment of the District Court for the Eastern District of California which issued a brief order granting a motion to dismiss without an explanatory opinion. The opinion of the Court of Ap-

peals and the order of the District Court not yet reported appear in the appendix hereto.

Jurisdiction.

The final judgment of the Court of Appeals was entered on September 7, 1973 and this petition for a writ of certiorari is being filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Questions Presented.

1. Is governmental action by the State of California involved in the enforcement of compulsory membership in a union through an agreement between the union and the employers when the agreement is authorized, approved, encouraged, protected and made enforceable at law and in equity under the common law of the State and under its statutes as interpreted by its highest court?

2. Is an agreement imposing compulsory full union membership violative of the right of association protected under the First, Fifth, Ninth and Fourteenth Amendments to the Federal Constitution?

3. Is a union shop agreement compelling full union membership violative of the right to work protected under the First, Fifth, Ninth and Fourteenth Amendments?

4. Are other provisions of the agreement, including the hiring hall, the right of the union to require the discharge of any employee found by it to have engaged in anti-union activity, and priority of strikers in referrals for employment by growers, singly or collectively, or in combination with the full union membership, so arbitrary and unreasonable as to deprive petitioners of their constitutional rights?

Constitutional and Statutory Provisions Involved.

Petitioners invoked below the protection of their rights under the First, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States.

They invoked the jurisdiction of the District Court under 28 U.S.C. 1331, the general jurisdictional statute, under the Civil Rights Jurisdictional Act, 28 U.S.C. 1343(3), since the action is one "to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States * * *" and under 28 U.S.C. 2201, 2202, the Declaratory Judgment Act. There is no requirement of jurisdictional amount under 28 U.S.C. 1343(3).

The District Court also has jurisdiction under 42 U.S.C. 1983 in an action at law, suit in equity, or other proper proceeding for redress to enforce liability to the party injured by any person who "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

Petitioners claimed they were subjected to injury and damages by the respondents acting under the Labor Code of California, §§921-923, 1011, 1012, 1015-1018, and 1126, as well as the Business and Professions Code of California, §16,703; and the common law of the State, all as authoritatively interpreted by the Supreme Court of California.

The constitutional and statutory provisions named above appear at pages 1-8 of the appendix.

Statement of the Case.

Petitioners, employed as vineyard workers by the defendant growers in the San Joaquin Valley of California, brought a class action in the District Court on September 22, 1970 against the union, two of its officers, and the growers. They asked for an injunction, for declaratory relief and for damages. They alleged that the union had entered into an agreement with the growers dated July 29, 1970 for a period of three years, requiring compulsory full union membership as a condition of employment. The complaint alleges that the full union membership is coupled with other arbitrary and unreasonable conditions, including (1) a union hiring hall, (2) priority of employment of strikers and (3) right of the union to force the discharge of any employee whom it regards as having engaged in anti-union activity. The complaint alleges that the union did not represent a majority or a substantial portion of the agricultural workers employed by the growers, nor did a majority or a substantial portion of them desire to be represented by the union.

The complaint further alleges that the petitioners have been victims of threats of discharge, actual discharge, demotion, discrimination, transfer and refusal of employment.

The complaint alleges that the agreement on its face and in its operation and effect, is in violation of the First, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States in that it deprives petitioners of freedom of association, freedom to pur-

sue the occupation of their choice, the right to work, freedom of speech, freedom of thought, freedom of political action, freedom from unwarranted invasion of privacy, and other fundamental liberties.

The complaint alleges that the action of respondents has been permitted, authorized and sanctioned by the State of California through its statutory and decisional law as interpreted by the Supreme Court of the State.

The respondents admitted below that the growers did not voluntarily sign the collective bargaining agreement, including the full union shop clause, but were forced to do so by a boycott by the union.

The respondents filed a motion to dismiss which was sustained by the District Court on April 19, 1971 because "the action of the state legislature in making a union shop contract permissible is not sufficient state action to permit plaintiffs to bring this action under the Civil Rights Statutes". Notice of appeal to the Court of Appeals was filed May 16, 1971. The Court of Appeals in a *per curiam* decision September 7, 1973 affirmed the judgment below on the ground that there was no compulsion of state law requiring respondents to enter into the union shop agreement.

The agreement has expired, and has not yet been renewed, but petitioners still seek the damages alleged in the complaint.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Is in Conflict With Decisions of This Court.

The decision of the Ninth Circuit is in conflict with decisions of this Court on (1) the extent of state involvement in the conduct of private parties necessary to constitute governmental action; (2) the protection of freedom of association under the Constitution of the United States; and (3) the protection of the right to work under the Constitution.

2. State Compulsion Not Necessary to Governmental Action.

The Court of Appeals held that no governmental action is present since the complaint does not allege that the union shop agreement was entered into under compulsion of any state law coercing the private parties to include union shop provisions in a labor contract.

The Court cites only two authorities, *Shelley v. Kraemer*, 334 U.S. 1, 13 (1947) and *Adickes v. Kress & Co.*, 398 U.S. 144, 170 (1970), as holding that in order to convert ordinary private action into state action within the meaning of the Fourteenth Amendment there must be some compulsion of state law. Neither case laid down any such rule.

Shelley held that a judicial decree enforcing a racially restrictive covenant is a manifestation of governmental action. This, of course, is one form of governmental action but many decisions of this Court recognize other forms.

Adickes reversed a decision against a white teacher who had been refused service in a restaurant in Mississippi because she went there with a group of Negroes.

The Court asserted that the question most relevant for the case was whether the decision of the owner of a restaurant to discriminate on the basis of race under the compulsion of state law offends the Fourteenth Amendment (398 U.S. at 170). But immediately prior to this statement it expressly recognized that state involvement as well as state compulsion may produce governmental action sufficient to invoke constitutional rights, saying:

> "In analyzing this problem, it is useful to state two polar propositions, each of which is easily identified and resolved. On the one hand, the Fourteenth Amendment plainly prohibits a State itself from discriminating because of race. On the other hand, § 1 of the Fourteenth Amendment does not forbid a private party, not acting against a backdrop of state compulsion *or involvement*, to discriminate on the basis of race in his personal affairs as an expression of his own personal predilections." (398 U.S. at 169) (Italics ours).

Sufficient state involvement to constitute governmental action is present where as here it takes the form of authorization, approval, encouragement, protection or regulation of private conduct which is the subject of complaint.

This Court has held that governmental action is involved where Congress by statute authorizes a union shop agreement, and an employer and a union proceeding thereunder make such an agreement. This was the conclusion of the court in *Railway Employees Dept. AFL v. Hanson*, 351 U.S. 225, 232 (1956), even

though no compulsion by Congress to make the agreement was present. The Court there held:

> "The enactment of the federal statute authorizing a union shop agreement is the governmental action on which the Constitution operates though it takes a private agreement to invoke the federal sanction."

The federal statute in *Hanson* authorizing the union shop contained language expressly superseding state laws to the contrary. But the presence of this language was not controlling because the statute authorizing an agreement in interstate commerce would occupy the field to the exclusion of state laws unless some contrary intent on the part of Congress were shown. In *Terry v. Adams,* 345 U.S. 461, 462 (1953) and in *Smith v. Allwright,* 321 U.S. 649, 663-664 (1944) the Court found governmental action in the exclusion of Negroes from party primaries, notwithstanding the circumstance, as stated in *Terry* that "No state law directed such exclusion."

Many other cases are to the same effect. Among them is *Reitman v. Mulkey,* 387 U.S. 369 (1967), where the Court held that state action was involved in the refusal of private parties to rent residential property to Negroes. The refusal was based upon an amendment to the Constitution of California providing that neither the State nor any of its agencies shall abridge the right to rent residential property to such persons as he chooses. But the state constitutional provision was struck down not because it commanded discrimination by private parties but because it carried with it authorization and encouragement of such conduct—which is what is present here.

Long ago this Court in *McCabe v. Atchison, Topeka & Santa Fe R. Co.*, 235 U.S. 151, 161, 162 (1914), declared that state action is present where a rail carrier acts under the authority of a state law to discriminate in furnishing equipment to its patrons.

The Court held in *United States v. Guest*, 383 U.S. 745, 755, 756 (1966) that governmental action is present where the involvement of the state is indirect or its action is only one of several cooperative forces leading to the deprivation of the rights of a citizen.

In *Anderson v. Martin*, 375 U.S. 399, 402-403 (1964), the Court held that governmental action may be found in the interplay of governmental and private action. A state statute required the showing of the race of candidates on ballots used in elections to public office. The Court held that it was subject to review on constitutional grounds because it encouraged and assisted in discrimination.

Governmental regulation of the subject matter of the complaint, falling short of compulsion of private parties, was held to constitute governmental action in *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1953) and *Smith v. Allwright, supra*, 321 U.S. 649 (1944).

Nonobvious involvement of the state in private conduct of a restaurateur by leasing to him space in a building located on a public parking lot owned and operated by a state agency was held in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) to constitute governmental action, the Court stating that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance" (365 U.S. at 722).

3. California Common and Statutory Laws Authorize, Approve, Encourage and Protect Union Shop.

Many California cases have established the validity of the union shop and the closed shop; *Parkinson Co. v. Bldg. Trades Council,* 154 Cal. 581 (1908); *Pierce v. Stablemen's Union,* 156 Cal. 70 (1909); *C. S. Smith Met. Market Co. v. Lyons,* 16 Cal. 2d 389 (1940); *Park & T.I. Corp. v. Int. Etc. of Teamsters,* 27 Cal. 2d 599 (1946); and the rule has been applied even where all of the employees were opposed to joining the union. *McKay v. Auto Retail S. L. Union #1067,* 16 Cal. 2d 311 (1940); *C. S. Smith Met. Market Co. v. Lyons, supra,* 16 Cal. 2d 389 (1940); *Petri Cleaners v. Automotive Employees, Local 88,* 53 Cal. 2d 455 (1960); *Messner v. Journeymen Barbers,* 53 Cal. 2d 873, 351 P. 2d 347 (1960).

In *Shafer v. Registered Pharmacists Union,* 16 Cal. 2d 379, 387 (1940), the Supreme Court of California held that the courts of the state had recognized the validity of the union shop for more than thirty years and that the legislature had shown its approval of the propriety of such contracts. A druggist there sought to enjoin a union from picketing and boycotting his place of business to force him to agree to a closed shop. The injunction was denied because the objective of the picketing and boycotting was a lawful one—the establishment of a closed shop. The Court based its conclusions upon an analysis of §§920-923, 1011, 1012, 1015 and 1016 of the Labor Code, as well as on the course of prior judicial decisions.

The statutory provisions held controlling in *Shafer* and subsequent cases are of critical importance here. Section 921 of the Labor Code declares to be contrary

to public policy every promise between employee and employer whereby the former promises either to join or remain a member of a labor organization or not to join or not to remain a member.[1]

Section 922 makes it a misdemeanor for any person to coerce or compel any person to agree not to join or become a member of any labor organization as a condition of employment.

Section 923 declares the public policy that the individual workman shall have full freedom of association, self-organization and designation of representatives of his own choosing.

Section 1011 makes it a crime to misrepresent the kind of labor employed in producing goods.

Under Section 1012 it is a crime to misrepresent the employment of union labor in connection with the sale of goods; under Section 1015 to forge a union label or trademark; under Section 1016 to use a union label without authorization; under 1017 to willfully make an unauthorized use of the card of any labor union to obtain aid, assistance or employment; and under §1018 willfully to wear without due authorization the button of any labor union. Section 1126 specifies that a collective bargaining labor agreement shall be enforceable at law and in equity and that a breach shall be subject to the same remedies including injunctive relief as other contracts.

The State antitrust statutes grant wide exceptions to labor unions. Section 16703 of the Business and Pro-

[1]This section is open to the construction that it outlaws every form of compulsory union membership. But the Supreme Court of California has interpreted it as confined to a ban on yellow dog contracts. *Petri Cleaners v. Automotive Employees*, 53 Cal. 2d 455, 470 (1960).

fessions Code enacts that labor is not a commodity. Where the primary purpose of a combination is reasonably relevant to collective bargaining or to the attainment of a legitimate labor objective the cases hold it is not unlawful. *Los Angeles Pie Bakers Assn. v. Bakery Drivers' Local,* 122 Cal. App. 2d 337, 264 P. 2d 615 (1954); *Schweizer v. Local Joint Executive Board of San Diego,* 121 Cal. App. 2d 45, 262 P. 2d 568 (1953).

In some of the more recent cases the State Supreme Court after the analogy of *Railway Employees Dept. AFL v. Hanson, supra,* 351 U.S. 225, 232 (1956), has struck down city and county ordinances prohibiting any form of compulsory union membership, not merely on the ground that the state has occupied the field, but also on the ground that the ordinances proscribe an arrangement which the state statutes just reviewed affirmatively authorize, approve, encourage and protect. *Stephenson v. City of Palm Springs,* 52 Cal. 2d 407, 340 P. 2d 1009 (1959); *Chavez v. Sargent,* 52 Cal. 2d 162, 339 P. 2d 801 (1959); *Retail Clerks Union v. Superior Court,* 52 Cal. 2d 222, 226, 339 P. 2d 839 (1959).

Thus the statutes and judicial decisions of California which authorize, approve, encourage, protect and make enforceable at law and in equity an agreement for full union membership constitute governmental action sufficient to give an injured employee the right to the protection of the federal constitution.

4. Full Union Shop Violates Freedom of Association.

(a) Agreement Compels Full Union Membership.

The agreement here requires full union membership in the strictest sense of the term: "each worker shall be required to become a member of the union", despite the fact that the union does not represent a majority or a substantial proportion of the workers. He must "remain a member of union in good standing", with the union "the sole judge of the good standing". There is no qualification upon this requirement. It is reinforced by further provisions of unusual harshness serving to extend union control over the worker and to impair his liberties. For instance, he ordinarily cannot get a job except upon referral by the union hiring hall. If the union findings him guilty of anti-union activity he must be discharged.

This Court has not passed on the constitutionality of a full union shop such as the one here involved. It has, however, in three cases considered the constitutionality of the greatly restricted form of union shop authorized under §2, Eleventh of the Railway Labor Act, 45 U.S.C. 152, Eleventh, which provides, much like §8(a)(3) of the National Labor Relations Act, 29 U.S.C. 158(a)(3), that a carrier and a labor organization may make an agreement requiring all employees to become members of the union, provided that membership is not denied for any reason other than failure of the employee to tender periodic dues, initiation fees and assessments, *Railway Employees Dept. AFL v. Hanson, supra,* 351 U.S. 225 (1956); *International Machinists v. Street,* 367 U.S. 740 (1961); *Brotherhood of Clerks v. Allen,* 373 U.S. 113 (1963).

In *Hanson* the Supreme Court of Nebraska had held that a railway union shop was unconstitutional because, among other things, it deprived employees of their freedom of association. Upon appeal this Court reversed on the ground that the only agreement authorized by the statute did not require full union membership but only exacted the payment of periodic dues, initiation fees and assessments to compensate the union for its services as a collective bargaining representative. The agreement here is not so limited, but requires full membership, from which the Court specifically withheld its approval in *Hanson*.

In *Street* the question was whether the same restricted type of union shop was unconstitutional because a substantial part of union dues were used for political and ideological purposes over the objection of the complaining employees. The court held that such a use of forced contributions raised constitutional questions of the utmost gravity. It decided, however, that the statute could reasonably be construed to forbid such a use of the money of employees, making it unnecessary to decide the constitutional issue. In *Allen* the same issue was decided in the same way.

The distinction between full union membership on the one hand, and a requirement of compensation to the union for its services under a restricted form of union shop on the other hand is exemplified in several subsequent decisions of this Court. In *NLRB v. Allis-Chalmers*, 388 U.S. 175 (1967), the Court upheld fines levied against full union members for crossing picket lines during a strike and working as usual. The case is illustrative of one very common way in which full union membership entails loss of freedom. There are

many more such losses of freedom inherent in full union membership and on top of all of them are piled the losses of freedom flowing from the other specific provisions of the agreement in this case. In *NLRB v. Granite State Joint Board*, 34 L.Ed.2d 422 (1972), the Court held that a union could not lawfully fine a member who had resigned and thereafter crossed a picket line to go to work, since it has no more control over him than over a man in the street. The Court said:

> "We have, therefore, only to apply the law which normally is reflected in our free institutions—the right of the individual to join or to resign from associations as he sees fit * * *. [W]hen there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street." (34 L.Ed.2d 426).

This case was followed in *Machinists & Aerospace Workers v. NLRB*, 36 L.Ed.2d 764 (1973), where the Court held that a union commits an unfair labor practice in fining for strike-breaking activities employees who have resigned from the union, even though the union constitution expressly prohibits members from strike-breaking.

In all three of the cases just reviewed the employees had originally been voluntary full union members. In *Allis-Chalmers* they still occupied that status when they went back to work during the strike. In the other two cases they had resigned before taking this course.

The imposition of full union membership in the case at bar is not only of doubtful constitutionality under *Hanson, Street* and *Allen* but the doubts must

be resolved against constitutionality under the decisions of this Court dealing with such basic liberties as freedom of association and the right to work.

(b) Freedom of Association Is Constitutionally Protected.

Freedom of association is a composite right derived from freedom of speech, freedom of assembly, freedom of petition, as well as the general right to liberty of action. It accords to the individual the right to order his life as he sees fit, to choose his occupation, his place of employment and what, if any, political party, fraternal order, club, union or other private organization he will join and support.

This Court has repeatedly declared that the freedom of association is not only guaranteed by the federal constitution but is one of the most fundamentally important of the rights secured by that instrument. *Gibson v. Florida Investigation Committee,* 372 U.S. 539, 543, 544 (1963). The vital relation of freedom of association to the foundations of the American system of government was affirmed in *Bates v. Little Rock,* 368 U.S. 516, 522, 523 (1960) and *Williams v. Rhoades,* 393 U.S. 23, 30, 31 (1968).

To deny a member of the Communist Party employment in a defense facility is in conflict with his right of association under the First Amendment where there is no showing of real danger to the national interest. *United States v. Robel,* 389 U.S. 258, 263, 264 (1967).

The Court has struck down statutes or regulations making it unlawful for a public employee to belong to the Communist Party. *Keyishian v. Board of Regents of New York,* 285 U.S. 5, 18 (1967); *Elfbrandt v. Russell,* 384 U.S. 11, 18 (1966); *Greene v. McElroy,*

360 U.S. 474 (1959); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

If men are to be free to join unions they must also be free not to join. Otherwise they have no freedom of association but a duty or obligation to join an organization selected not by themselves but by others, which is the essence of coercion and the very antithesis of freedom of choice which is the core of American constitutional liberty. As the Supreme Court of Maine declared in *Pappas v. Stacey*, 151 Me. 36, 116 A.2d 497, 500 (1955), appeal dismissed *Stacey v. Pappas*, 350 U.S. 870 (1955), "freedom to associate of necessity means as well freedom not to associate". See also *Board of Education v. Barnette*, 319 U.S. 624, 638 (1943); *NLRB v. Granite State Joint Board, supra*, 34 L.Ed.2d 422, 426 (1972).

5. Compulsory Full Union Membership Violates Right to Work.

Freedom of opportunity to engage in the common occupations of life such as that of a worker in the vineyards is a fundamental constitutional right secondary in importance only to the right of life. All save for a small fraction of mankind must work for a living and denial of the opportunity to earn a livelihood is one of the gravest infringements on the liberty of the individual. Every man has an inherent right to an opportunity to seek and retain the gainful employment which he desires, for which he may be fitted and which is available in a free society and in an economy of free enterprise.

The fundamental nature of the right to work was proclaimed by this Court in *Cummins v. Missouri*, 4 Wall. 277 (1867), in invalidating a clause in a state

constitution under which a priest was fined for officiating without taking a test oath. The court holding that the clause was invalid as a bill of attainder and an *ex post facto* law declared:

> "The theory upon which our political institutions rest is, that all men have certain unalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions are alike open to everyone * * *." (4 Wall. at 321, 322).

Another contemporaneous decision invalidated a similar test oath for those engaged in the practice of law. *Ex parte Garland,* 4 Wall. 333 (1867).

The right to work principle was successfully invoked to protect Chinese laundrymen in San Francisco who were being run out of business by discriminatory enforcement of a municipal ordinance in *Yick Wo v. Hopkins,* 118 U.S. 356, 357 (1886).

The principle was applied to protect owners of private employment agencies from statutes contrived to drive them out of business. *Adams v. Tanner,* 244 U.S. 590 (1917).

In *Meyer v. Nebraska,* 262 U.S. 390 (1923) the principle was used as a defensive shield in an attempt to drive out of employment teachers of foreign language in the hysteria engendered by World War I.

The principle was successfully invoked against a California statute denying Japanese fishermen the right to pursue their occupation off the Pacific Coast, *Takahashi v. Fish & Game Commission,* 344 U.S. 410 (1948); to protect the right of employment of a teacher in a

state college, *Wieman v. Updegraff, supra,* 344 U.S. 183 (1952); to prevent dismissal of a professor at a municipally-supported university, *Slochow v. Board of Education,* 350 U.S. 551 (1956); and to invalidate a statute denying an experienced railroad employee the right to serve as a conductor when he had not had experience as a conductor or brakeman for at least two years, *Smith v. Texas,* 233 U.S. 630, 636, 638 (1914).

In *Traux v. Raich,* 239 U.S. 33, 41 (1915), the Court affirmed an injunction against the enforcement of a state quota law which deprived alien restaurant workers of their right to work. Mr. Justice Hughes in holding that the prescribed quota contravened the Fourteenth Amendment declared:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure."

This opinion of Mr. Justice Hughes was relied upon by the Court in *Sugarman v. Dougall,* 37 L.Ed.2d 853, 859 (1973) in granting an injunction against the enforcement of a section of the New York Civil Service law disqualifying resident aliens from employment. The Court stated:

> "It is established, of course, that an alien is entitled to the shelter of the equal protection clause * * *. This protection extends, specifically, in the words of Mr. Justice Hughes, to aliens who 'work for a living in the common occupations of the community', Truax v. Raich, 239 U.S. at 41 * * *."

This language of Mr. Justice Hughes was likewise quoted and relied upon by the Court in *In re Griffiths*, 37 L.Ed.2d 910, 914 (1973), in holding that Connecticut's exclusion of aliens from the practice of law violates the equal protection clause of the Fourteenth Amendment.

The recognition of the fundamental character of the right to work principle is not confined to the United States. In country after country in the free world, especially in Western Europe, the right to work or the freedom of association, or both, are embedded in the law and are held to invalidate compulsory union membership. Lenhoff, *The Problem of Compulsory Unionism in Europe*, The American Journal of Comparative Law, Winter, 1956, Vol. 5, No. 1, pages 18-43.

When after World War II the General Assembly of the United Nations in 1948 promulgated its Declaration of Human Rights it had vividly in mind the denial of liberties of the individual that had taken place in the immediate past under totalitarian Nazi and Fascist regimes in Germany and Italy and it declared that they should not be permitted in the future. Article Twenty of the Declaration states that:

> "1. Everyone has the right to freedom of peaceful assembly and association.
>
> 2. No one may be compelled to belong to an association."

The right to work is expressly protected in Section 1 of Article Twenty-Three which reads:

> "Everyone has the right to work, to free choice of employment, to just and favorable conditions of work, and to protection against unemployment."

The Declaration, of course, is not binding on this Court but it goes to show the far-reaching and world-wide importance of these rights and the gravity of their violation in a reversion to ancient tyrannies revived under Nazism and Facism.

The constitutional principles of freedom of association and the right to work as enunciated by this Court are in accordance with the enlightened conscience of mankind.

6. Case Presents Important Question of Constitutional Law Which Should Be Settled by This Court.

In holding that governmental action is not present in the action of private parties unless they are acting under compulsion of the State, the Ninth Circuit has gone squarely counter to the decisions of this Court on the same issue. The question of what constitutes governmental action so as to entitle the citizen to judicial relief from violation of fundamental rights is by its very nature an important question of constitutional law and one that should not be left unsettled in the Ninth Circuit or elsewhere. It is a question that should be settled by this Court in keeping with its past decisions.

7. Case Presents an Issue Which Is of Major Public Importance.

The issue whether a person in this country may be compelled against his will to belong to a private organization and to be subject to its direction and control is one of major public importance. Many employees, including agricultural workers, are excluded for one reason or another from the coverage of the two federal labor statutes which afford a substantial, although inadequate, measure of protection from the

evils which Congress has found to exist in compulsory union membership. Just as the liberties of the individual are protected by the Bill of Rights from oppressive governmental action so should they be protected from oppressions of the same kind at the hands of private organizations operating under governmental authority.

Conclusion.

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

December 5, 1973.

Respectfully submitted,

JONATHAN C. GIBSON,
REX H. REED,
JOHN L. KILCULLEN,
RICHARD B. ISHAM,
Counsel for Petitioners.

APPENDIX.

Principal Constitutional and Statutory Provisions Involved.

FEDERAL CONSTITUTIONAL PROVISIONS:

1. First Amendment to the Constitution of the United States:

   "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances."

2. Fifth Amendment to the Constitution of the United States:

   "No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal offense to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. Ninth Amendment to the Constitution of the United States:

   "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

4. Fourteenth Amendment to the Constitution of the United States:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

JURISDICTIONAL STATUTES:

1. 28 USCA § 1331:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff, and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930: July 25, 1958, Pub. L. 85-554, § 1, 72 Stat. 415."

2. CIVIL RIGHTS JURISDICTIONAL ACT, 28 USCA 1343:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * *

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

3. CIVIL RIGHTS JURISDICTIONAL ACT, 42 USCA § 1983:

§ 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R.S. § 1979.

5. DECLARATORY JUDGMENT ACT, 28 USCA §§ 2201 and 2202:

§ 2201. In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, § 111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub.L. 85-508, § 12(p), 72 Stat. 349.

§ 2202. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment. June 25, 1948, c. 646, 62 Stat. 964.

CALIFORNIA STATUTES:

1. LABOR CODE, § 921:

"Every promise made after August 21, 1933, between any employee or prospective employee and his employer, prospective employer or any other person is contrary to public policy if either party thereto promises any of the following:

(a) To join or to remain a member of a labor organization or to join or remain a member of an employer organization,

(b) Not to join or not to remain a member of a labor organization or of an employer organization.

(c) To withdraw from an employment relation in the event that he joins or remains a member of a labor organization or of an employer organization.

Such promise shall not afford any basis for the granting of legal or equitable relief by any court against a party to such promise, or against any other persons who advise, urge, or induce, without fraud or violence or threat thereof, either party thereto to act in disregard of such promise."

2. LABOR CODE, § 922:

"Any person or agent or officer thereof who coerces or compels any person to enter into an agreement, written or verbal, not to join or become a member of any labor organization, as a condition of securing employment or continuing in the employment of any such person is guilty of a misdemeanor."

3. LABOR CODE, § 923:

"In the interpretation and application of this chapter, the public policy of this State is declared as follows:

Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

4. LABOR CODE, § 1011:

"A person engaged in the production, manufacture, or sale of any article of merchandise in this State,

shall not, by any label placed or impressed upon such article, or upon its container, misrepresent or falsely state any of the following as to the production of such article:

(a) The kind, character, or nature of the labor employed.

(b) The extent of the labor employed.

(c) The number or kind of persons exclusively employed.

(d) That a particular or distinctive class or character of laborers was wholly and exclusively employed, when in fact another class, or character, or distinction of laborers was used or employed either jointly or in any wise supplementary to such exclusive class, character, or distinction of laborers.

Violation of any provision of this section is a misdemeanor punishable by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) or by imprisonment for not less than 20 nor more than 90 days, or both."

5. LABOR CODE, § 1012:

"Any person engaged in the production, manufacture, or sale of any article of merchandise in this State, or any person engaged in the performance of any acts or services of a private, public, or quasi-public nature for profit, who wilfully misrepresents or falsely states that members of trades unions, labor associations, or labor organizations were engaged or employed in the manufacture, production, or sale of such article or in the performance of such arts or services, is guilty of a misdemeanor punishable by a fine of not more than

five hundred dollars ($500), or by imprisonment in the county jail for not more than 90 days, or both."

6. LABOR CODE, § 1015:

"Any person who, without having an unrevoked written authority from such trade union, labor association or labor organization, wilfully forges or procures to be forged such label or trademark, with intent to sell or assist other persons to sell, any goods to which such forged label is affixed as having been made, manufactured, or produced in whole or in part by labor, laborers, or employees who are members of, or allied or associated with, such trade union, labor association, or labor organization, is guilty of a misdemeanor, punishable by a fine not more than five hundred dollars ($500) or imprisonment for not more than 90 days, or both."

7. LABOR CODE, § 1016:

"Any person who wilfully uses or displays the genuine label, trademark, insignia, seal, device or form of advertisement of any association or labor union, in any manner not authorized by such association or labor organization or not in conformity with the by-laws thereof, is guilty of a misdemeanor punishable by a fine not exceeding one hundred dollars ($100) or imprisonment for not more than three months, or both."

8. LABOR CODE, § 1017:

"Any person who wilfully uses the card of any labor union to obtain aid, assistance, or employment, unless entitled to use such card under the rules and regulations of a labor union within this State is guilty of a misdemeanor."

9. LABOR CODE, § 1018:

"Any person who wilfully wears the button of any labor union of this State, unless entitled to wear the button under the rules of such union, is guilty of a misdemeanor, and is punishable by imprisonment in the county jail for not more than 20 days or by a fine of not more than twenty dollars ($20), or by both fine and imprisonment."

10. LABOR CODE, § 1126:

"Any collective bargaining agreement between an employer and a labor organization shall be enforceable at law or in equity, and a breach of such collective bargaining agreement by any party thereto shall be subject to the same remedies, including injunctive relief, as are available on other contracts in the courts of this State."

11. BUSINESS AND PROFESSIONAL CODE, § 16703:

"Within the meaning of this chapter, labor, whether skilled or unskilled, is not a commodity."

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, Ninth Circuit.

September 7, 1973, No. 71-1930.

Appeal From the United States District Court for the Eastern District of California.

Before: HASTIE,* KILKENNY and GOODWIN, Circuit Judges.

PER CURIAM:

This is an appeal from an order dismissing a complaint that charged violation of Fourteenth Amendment rights on the ground that it failed to allege such state action as the Amendment requires.

The complaint alleges that the plaintiffs are present or former employees of the defendant growers of agricultural commodities and that union shop provisions of a labor contract between the defendant employers and the defendant United Farm Workers Organizing Committee, a labor organization, have resulted in the plaintiffs' discharge or other discriminatory action by the defendants against them as employees. The complaint also alleges without particularizing that the union shop contract is "on its face and in its operation and effect" violative of the Fourteenth Amendment. The complaint does not specify any causative or coercive involvement of the state in the alleged wrongdoing.

Reference to two leading cases will serve to highlight the inadequacy of this complaint to support a claim of violation of the Fourteenth Amendment. In *Shelley v. Kraemer,* 1947, 334 U.S. 1, 13, the Su-

*The Honorable William H. Hastie, Senior United States Circuit Judge of the Third Circuit, sitting by designation.

preme Court observed that "so long as the purposes of . . . [covenants that impose racial restrictions on property ownership] are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action of the State and the provisions of the [Fourteenth] Amendment have not been violated". Recently, the Supreme Court had occasion to apply this concept in a suit by a would-be patron against the owner of a restaurant that had denied her service on a racial ground. *Adickes v. Kress & Co.*, 1970, 398 U.S. 143. A majority of the Court agreed that in order to convert such ordinarily private action into state action within the meaning of the Fourteenth Amendment, there must be some "compulsion of state law". 398 U.S. at 170.

The present complaint does not allege that the defendants entered into and performed their union shop agreement under any compulsion of California law rather than through the normal give and take of collective bargaining and labor-management relations. We add that we have found nothing in California law that coerces parties to include union shop provisions in a labor contract. In these circumstances, we agree with the district court that the complaint was inadequate.

The judgment is affirmed.

Order Entered by District Court.

In the United States District Court for the Eastern District of California, April 19, 1971.

Defendants' motion to dismiss was argued and submitted, with briefs.

The action of the State Legislature in making a union shop contract permissible is not sufficient state action to permit plaintiffs to bring this action under the Civil Rights statutes.

Defendants' motion to dismiss is granted.

DATED: April 19, 1971.

M. D. CROCKER
United States District Judge

IN THE

Supreme Court of the United States

JAN 2 1974
MICHAEL RODAK, JR., CLERK

October Term, 1973
No. 73-884

DELORES MENDOZA, *et al.*,

Petitioners,

vs.

UNITED FARM WORKERS ORGANIZING COMMITTEE, *et al.*,

Respondents.

Response in Opposition to Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JAMES VANCE HENRY,
900 "M" Street,
Fresno, Calif. 93721,
(209) 233-6571,
Attorney for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Response in Opposition to Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Questions Presented.

1. Does enforcement by respondent labor organization and employers of their collective bargaining contract involve state action by California, whose statutes and decisional law in general have authorized, approved, and encouraged the institution of the "union shop"?

2. Is an agreement requiring membership "following seven (7) continual calendar days of employment" in itself violative of any right of association or right to work protected by the United States Constitution?

Statement of the Case.

Petitioners do not allege that the contract in question requires "compulsory full union membership as a condition of employment."

Petitioners' reference to the union boycott is burdensome, irrelevant, immaterial matter.

Petitioners do not allege that they have been denied employment because they have been refused membership in respondent union after making request therefor.

Petitioners Do Not Allege Facts Sufficient to State a Claim.

A fair reading of the Court of Appeals' decision reveals that Court in no sense applies a test of "compulsion of state law." *Shelley v. Kraemer*, 334 U.S. 1 (1947), established a state action standard—significant, unambiguous involvement in a particular transaction —from which the Court has never retreated. Rather than showing some immediate and direct effect of state activity, petitioners show only the probabilities of how some court in California might some day deal with the collective bargaining agreement in question.

This Court recently held in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), that state activity much more direct and substantial than the involvement in the present case was insufficient to state a claim under the Constitution; even a state's detailed regulation and licensing with quotas imposed does not represent state action where the precise rules or conditions limiting conduct are voluntarily agreed upon by the private parties engaged in private affairs.

It is indisputable that California in its statutes and case law has maintained a strict policy of neutrality towards collective bargaining matters and has simply attempted "to balance the industrial equation, so far as it is possible to do so, by placing employer and employee on an equal basis," *Shafer v. Registered Pharmacists Union Local 1172*, 16 Cal. 2d 379 (1940). Section 923 of the California Labor Code, set out at page 5 of the Petitioners' Appendix, states that governmental authority "has permitted and encouraged employers to organize in the corporate and other forms of capital control," and so therefore it "is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment."

The language from *Railway Employees Dept. AFL v. Hanson*, 351 U.S. 225 (1956), quoted by Petitioners at page 8 of their brief, is the explanation by this Court of its agreement with a statement of the Nebraska high court. In its opinion the Nebraska Supreme Court had referred to the 17 states which at the time of Congress' action had right-to-work provisions. Thus, the action of Congress in *Hanson* had cut across state law already in effect, permitting contracts that otherwise would be outlawed by the states' statutes.

In contrast to Petitioners' statement at page 12, there is no analogy between California Supreme Court action and the *Hanson* facts. In the California cases cited in support of Petitioners' contention, the California Court merely shielded agreements from nullification by local laws enacted subsequent to formalization by the legislature of the state's traditional hands-off policy.

No Important Constitutional or Public Question Is Stated.

The *Hanson* case, *supra,* demonstrates that constitutional issues do not arise alone out of the terms of contracts or out of union constitutions. See *Hanson* at footnotes 7, 8, and 9 and the text they amplify. Here, as in *Hanson,* Petitioners protest against what is comparable to the requirement in some states that a lawyer become a member of an integrated bar. 351 U.S. at 238.

Moreover, in finding that Congress' choice of the union shop as a stabilizing force was proper, this Court in *Hanson* noted that the right to work must be looked at in terms of "long-range interests of workers." 351 U.S. at 234.

> "One would have to be blind to history to assert that trade unionism did not enhance and strengthen the right to work . . . To require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course. But Congress might well believe that it would help insure the right to work. . . ." *Hanson, supra,* 351 U.S. at 235.

Conclusion.

For all these reasons this Court should not issue a writ of certiorari.

December 28, 1973.

Respectfully submitted,

JAMES VANCE HENRY,
Attorney for Respondents.

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IN THE

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UNITED FARM WORKERS ORGANIZING COMMITTEE,

Respondents.

REPLY BRIEF OF PETITIONERS.

JONATHAN C. GIBSON,
REX H. REED,
JOHN L. KILCULLEN,
RICHARD B. ISHAM,
1212 Home Tower,
707 Broadway,
San Diego, Calif. 92101,
Counsel for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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REPLY BRIEF OF PETITIONERS.

I

Arguments in Respondents' Statement of the Case Are Unfounded.

Petitioners will endeavor to reply to two of the three arguments made by respondents in their statement of the case. The third begs the principal question at issue.

1. The contract in question requires full union membership by providing as set forth in the complaint "union membership shall be a condition of employment. Each worker shall be required to become a member of union * * *. Any worker who fails to become a member of union * * * shall be immediately discharged * * *." [R 4.]

The broad requirements of the contract here thus sharply contrast with the restricted or limited form of

membership permitted by the National Labor Relations Act, 29 U.S.C. § 158(a)(3), and by the Railway Labor Act, 45 U.S.C. § 152, Eleventh. The constitutionality of the latter statute was upheld in *Railway Employees' Dept. AFL v. Hanson,* 351 U.S. 225 (1956) on the ground that it imposed no requirement other than the payment of compensation to the union for its service as collective bargaining representative.

2. Petitioners' reference to the coercive effect of the union boycott is based upon respondents' representation to the District Court, which discloses the larger area of respondents' coercion:

> "[D]efendant union was compelled to secure * * * unionization of the table grape industry by resort to * * * table grape boycott * * *. Because of the success of the grape boycott * * * defendant growers * * * decided to sue for peace and negotiate a collective bargaining agreement with defendant union * * *." [R 31, 32.]

II

Court Below Applied a Test of Compulsion of State Law.

Contrary to respondents' "fair reading", the whole basis of the opinion of the Court of Appeal is its holding that compulsion of state law is essential to the existence of governmental action in a union shop agreement between private parties.

Thus the Court said:

> "The complaint does not specify any causative or coercive involvement of the state * * *." (P. 9.)

The Court incorrectly cited *Adickes v. Kress & Co.*, 398 U.S. 143 (1970) as holding:

> "In order to convert such ordinary private action into state action * * * there must be some 'compulsion of state law' ". (P. 10.)

The Court below then concluded its brief opinion by declaring:

> "The present complaint does not allege * * * any compulsion of California law * * *. Nothing in California law * * * coerces parties to include union shop provisions in a labor contract. In these circumstances we agree with the District Court that the complaint was inadequate." (P. 10.)

Plainly the Court held that there could be no governmental action unless the State compelled the union shop. Equally plainly this was to base the decision on an erroneous statement of the law.

III

Respondents Compelled the Union Shop, but the State Authorized, Approved, Encouraged and Protected Its Action.

Three parties are affected by this union shop agreement: (1) the union, (2) the employers, and (3) the employees. The union was the only one of the three acting voluntarily. The employers as well as the employees were the object of coercion. The suit here was brought by the petitioning employees complaining that they are being conscripted against their will into a private organization. They invoked the protection of the Federal Constitution because they are being deprived of rights under it by a union shop in which California is significantly involved.

The Supreme Court of California many years ago interpreted the common law of the State as legalizing the union shop. *Parkinson Co. v. Building Trades Council,* 154 Cal. 581 (1908); *Pierce v. Stabelemen's Union,* 156 Cal. 70 (1909). After the enactment in 1933 of the provisions of the Labor Code dealing with the union shop and the closed shop, the State Court held that those arrangements were authorized, approved, encouraged and protected, thus going significantly further than the Court had gone in construing the common law. *Stephenson v. City of Palm Springs,* 52 Cal. 2d 407, 410 (1959); *Chavez v. Sargent,* 52 Cal. 2d 162, 196, 197 (1959); *Retail Clerks Union v. Superior Court,* 52 Cal. 2d 222, 226-228 (1959). What the highest Court of the State did in construing those statutes and whether what it did constitutes governmental action sufficient to invoke the protection of the Constitution of the United States are questions of federal law under which the meaning of the State's statute must be read as the highest court of the state has interpreted it. *NAACP v. Button,* 371 U.S. 415, 432 (1963); *Minnesota Ex rel. Pearson v. Probate Court,* 309 U.S. 270, 273 (1940); *Herbert v. Louisiana,* 272 U.S. 312, 317 (1926); *Marshall v. Sawyer,* 301 F. 2d 639, 646 (C.A. 9, 1962).

In *Minnesota Ex rel. Pearson v. Probate Court, supra,* Chief Justice Hughes declared:

> "For the purpose of deciding the constitutional questions appellant raises we must take the statute as though it read precisely as the highest court of the state has interpreted it." (309 U.S. at 273.)

Under this rule the provisions of the State Labor Code relied upon by the Supreme Court of California must be read as authorizing, approving, encouraging and pro-

tecting the union shop. They constitute significant, substantial and sufficient state action to invoke the protection of the Federal Constitution.

IV

Hanson Case Demonstrates Governmental Action Here.

In *Railway Employees' Dept. AFL v. Hanson, supra,* 351 U.S. 225 (1956) the statute occupied the whole field in the railroad and airline industries with a uniform rule applicable throughout the country authorizing a limited and restricted form of union shop. It not only struck down conflicting state right to work laws then existing but also rendered all of the states powerless to enact similar laws in the future. This statute expressly authorized a form of union shop unknown to the common law, and set forth a detailed pattern to be observed in its administration.

This Court in *Hanson* construed the statute there as leaving the union and the employer free, as under California law they are free here, either to make or not to make such an agreement, saying that the statute is only permissive and Congress has not compelled nor required carriers and employees to enter into union shop agreements (351 U.S. at 232). It nevertheless went on to hold governmental action to be present (351 U.S. at 232).

V

Hanson Rule Recognized in Subsequent Cases.

The respondent is in error in urging that the decision of this Court in *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972) rules out the presence of governmental action here. The Court there cited *Reitman v. Mulkey,* 387 U.S. 369 (1967), as holding that where the impetus is private, the state must have significantly

involved itself in the action for it to fall within the ambit of the constitutional prohibition. The significant involvement in *Reitman* consisted of state authorization, encouragement and assistance of discrimination by private parties; and it was held to constitute governmental involvement sufficient to invoke protection of the Federal Constitution. In *Moose Lodge* the Court after citing *Reitman* said in a way signifying approval of the two decisions as both right and consistent with one another, ascerting:

> "However detailed this type of regulation [in Moose Lodge] may be in some particulars, it cannot be said in any way to foster and encourage racial discrimination". (407 U.S. at 176, 177.)

Other statements of the court are to the same effect. (407 U.S. at 173, 175, 176.).

These passages in the opinion in *Moose Lodge* show that respondents are on infirm ground in regarding that case as departing from *Hanson* and from *Reitman* in their holding that governmental action is present where the state has authorized, encouraged and assisted the acts of which complaint is made.

In *Robinson v. Florida,* 378 U.S. 153 (1964), a group of blacks and whites were convicted in a Florida state court for violating a Florida statute by remaining in a restaurant after the manager had requested them to leave. This Court reversed, holding that the conviction violated the Equal Protection Clause of the Fourteenth Amendment in view of the fact that the State, through its regulations requiring separate washroom facilities for each race, whether employed or served in a restaurant, had become involved to a significant extent in bringing about restaurant segregation. The State neither commanded nor authorized the seg-

regation, but it placed a burden through its regulations on the service of patrons of both races on equal terms.

VI

Important Constitutional and Public Questions Are Stated.

First: The complaint at bar raises most of the constitutional issues reserved in *Hanson* as well as in *Street*, 367 U.S. 740, 748, 749 (1961), where as here, petitioners sought recovery for infringement of the Bill of Rights of the Federal Constitution. In view of the allegation, it was the duty of the District Court to entertain the suit and to permit petitioners to present their evidence. *Bell v. Hood*, 327 U.S. 678, 683-685; *Conley v. Gibson*, 355 U.S. 41, 45, 46 (1957). This Court in the latter case declared:

> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

Second: There is little analogy between a compulsory union shop and an integrated bar. Mr. Justice Douglas, who made the analogy in *Hanson*, later commented: "But on reflection the analogy fails." *Lathrop v. Donohue*, 367 U.S. 820, 879 (1961). The integrated bar is usually a governmental agency, operating under the Supreme Court of the State in the advancement of the science of jurisprudence, in fostering the continuing legal education of bar, as well as in exercising some functions in connection with complaints against lawyers. Annotation, 114 ALR 161, s 151 ALR 617. The union under the collective bargaining agreement

exercises powers over the employee far beyond any control asserted by an integrated bar over a lawyer. This agreement, and state laws take away a large part of the right of the worker to contract for his own employment and transfers it to the union as collective bargaining representative. The union may call the employee out on strike and punish him for crossing the picket line to go back to work. It may require conformity with other provisions of its constitution, by-laws, rules and regulations, as well as provisions of the collective bargaining agreement, such as those involved here.

Third: The attack here is not as respondents imply on the union as such, but on its state-aided abuse of power by conscripting unwilling employees as full union members. *Hanson* is no authority for that or for anything other than the right of the Congress to authorize an agreement to require the employee to compensate the union for its services as collective bargaining representative. Respondents have done far more here than to require such compensation.

Conclusion.

It is respectfully submitted that the respondents have shown nothing which should dissuade this Court from issuing its Writ of Certiorari to the Court of Appeals for the Ninth Circuit in this case.

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Respectfully submitted,

JONATHAN C. GIBSON,
REX H. REED,
JOHN L. KILCULLEN,
RICHARD B. ISHAM,
Counsel for Petitioners.